United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

74-1147

In The

United States Court of Appeals

For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellant,

v.

ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN and PATRICK GIBBONS,

Appellees.

APPELLEES' PETITION FOR REHEARING OR FOR REHEARING IN BANC

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The judgment of the Court was entered June 7, 1974. Appellees' motion for extension of time for filing a petition for rehearing until July 1, was filed with the Court June 21, 1974, and has not yet been acted upon.

Appellees petition for rehearing, or in the alternative, for rehearing in banc, for the following reasons:

The Court, in its opinion of reversal herein, has overlooked the Constitutional requirements which demand either that the Jencks Act be construed so as to allow production of prior statements of government witnesses who testified at a suppression hearing, or that the Jencks Act be held invalid insofar as it denies the district judge the power to order such production after the witness has testified, in a proper case.

The Court recognized, Slip Opinion at 4008, that findings at a suppression hearing are ordinarily final and will not be relitigated at trial, at least in the case of Fourth Amendment

suppression motions and especially when the witnesses offered by the government at the suppression hearing do not testify at trial, as may well be the case here. Appellees submit that this is equally true in the case of statements taken from a defendant, in that relitigation of the matter before the jury (quite aside from the difficulties in terms of trial tactics for defense counsel) has been held insufficient to protect defendants' rights under the Fifth Amendment. *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Sims* v. *Georgia*, 385 U.S. 538 (1967).

The Court also recognized that the result of a suppression hearing "will often determine the result at trial," at 4008. In such a situation, if the defense is denied access to prior statements of government witnesses who testify at the suppression hearing, where the trial judge finds them relevant to a full and fair hearing, the case will be decided on incomplete and partial evidence.

The Court's opinion thus comes to this: the Jencks Act denies the defendant the right to a full hearing on what may be his only meaningful defense.

The issue is simply, whether a defendant can be convicted upon evidence gathered by Government agents acting in violation of the Fourth and Fifth Amendments. The point is too well settled to require citation that courts may not allow such convictions. But this Court's opinion, by holding that a full and fair hearing on the suppression of such evidence may not be had, seriously erodes that great and fundamental principle. If defendants have a right to the suppression of unconstitutionally obtained evidence, but may not have a full hearing on their motions to suppress, that "right" is rendered virtually meaningless for lack of a remedy.

This is far more than "a matter of policy" as the Court characterized it, at 4008. Nor is it merely one of those "rules of procedure and evidence" which are within the supervisory power of the Supreme Court to prescribe unless Congress

provides otherwise, as was the precise issue presented in *Jencks* v. *United States*, 353 U.S. 657 (1957), see *Palermo* v. *United States*, 360 U.S. 343, 353 n.11. That it is a question of Constitutional magnitude was made resoundingly clear in *Jackson* v. *Denno*, 378 U.S. 368 (1964), where the Court struck down an analogous bar to a full and reliable determination of the constitutionality of the evidence sought to be used at trial against a defendant. Justice White's language, for the Court, is equally relevant to the present case:

> Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne — facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative. The overall determination of the voluntariness of a confession has thus become an exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence. [citations omitted] Where pure factual considerations are an important ingredient, which is true in the usual case, appellate review in this Court is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination, pro tanto, takes on an increasing finality. *The procedures used in the trial court to arrive at its conclusions on the coercion issue progressively take on added significance as the actual measure of the protection afforded a defendant under the Due Process Clause of the Fourteenth Amendment against the use of involuntary confessions. The procedures must, therefore, be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend.* 378 U.S. at 390-91 (emphasis added)

See also note 16, 378 U.S. at 389:

> Further obstacles to a reliable and fair determination of voluntariness [where the voluntariness is litigated only before the trial jury] result from the ordinary rule relating to cross-examination and impeachment. Although not the case here, an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination, both of whose prejudicial effects are familiar. The fear of such impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence as well as voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony on the facts underlying the claim of coercion. Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. Cf. *United States v. Carigan*, 342 U.S. 36, 96 L.Ed 48, 72 S.Ct. 97.

Although the voluntariness of a confession was the precise issue in *Jackson*, these considerations should apply no less to the adjudication of motions to suppress the fruits of allegedly unlawful searches and seizures, which motions are equally sensitive and demand equally close scrutiny under the Constitution.

The issue, then, is whether defendants are to have a "full and reliable determination" of the constitutionality of the evidence sought to be used against them, or whether an Act of Congress shall be read, and held sufficient, to override the fundamental right not to be convicted upon unconstitutional evidence. The question answers itself: Congress may not decree that the defendants are to be jailed without an opportunity to raise their Constitutional defenses at a full and fair judicial hearing.

Although the statute would have to be declared invalid for the above reasons if it could only be read so as to deny the district court the power to compel production of government witnesses' prior statements as was done here, appellees submit that the

statute and legislative history permit, if not require, a construction which avoids the constitutional problems inherent in the contrary construction made by the court in its opinion in the present case. The legislative history, which was reviewed in Appellee's brief at pp. 8-9, nowhere indicates that Congress intended to cut off rights to a full hearing and cross-examination at suppression hearings; indeed as this court recognized in *United States* v. *Covello*, 410 F.2d 536, 544 (2d. Cir. 1969) and in the present case, at 4006, Congress appears not to have considered the matter. The only mischief against which the statute was directed was the untoward rummaging through government files that some lower courts had thought authorized by the *Jencks* decision; and such rummaging cannot occur when the district court's orders to produce, after the government witness has testified, are as narrowly drawn as in this case. In view of the expressed intent of Congress not to limit defendants' Constitutional rights, see S. Rep No. 981, Appellee's brief p. 8, this Court should be chary of attributing to Congress such an intent merely on the linguistic ground that the word "trial" must mean only the trial as to guilt and not the trying of facts going to defendants' rights not to be convicted on unconstitutional evidence. This is one of the "gaps to be filled and ambiguities to be resolved by judicial construction" noted in this statute by the Court in *Palermo*, *supra*, 360 U.S. at 349, and one of the "problems created by the statute" which four members of that Court predicted would arise. 360 U.S. at 360. This Court, in fulfilling its duty to resolve statutory ambiguities, should not do so in a manner so as to create further problems of a Constitutional dimension.

WHEREFORE, for the foregoing reasons, it is respectfully urged that this petition for rehearing, or in the alternative, for rehearing in banc, be granted and that the judgment of the District Court be, upon further consideration, affirmed.

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AFFIDAVIT OF SERVICE

June 27, 1974

RE: The United States of America vs Anthony James Sebastian a/k/a Tony Sebastian and Patrick Gibbons

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

Johnson D. Hay , **being duly sworn, deposes and says:**

That he is associated with The Daily Record Corp. of Rochester, New York, and is over twenty-one years of age.

That at the request of Martoche & Collesano
Attorney(s) for Appellee Sebastian

(s)he personally served ~~three (3) copies of the printed [Record] [Brief] [Appendix] of the above-entitled case addressed to~~ two (2) copies of the printed Appellees' Petition for Rehearing or for Rehearing in Banc of the above-entitled case addressed to:

United States Attorneys Office
502 United States Courthouse
Buffalo, New York 14202

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

.....John D. Hay.....

Sworn to before me this 27th
day of June , **19** 74

Ellen A. Defendis
Notary Public
~~**Commissioner of Deeds**~~

ELLEN A. DEFENDIS, Notary Public
State of New York, County of Monroe
Commission Expires March 30, 1975